FILED

MAR 28 1963

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 957

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY TO MOTIONS TO AFFIRM

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4113 San Jacinto Street
Dallas, Texas

ROLAND RICE
HOMER E. CARPENTER
JOHN S. FESSENDEN
RICHARD B. SIMMON
1111 E Street, N. W.
Washington, D. C. 20004
Attorneys for Appellants

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. BURNETT
F. G. FREUND
R. EDWIN BRADY
1616 P Street, N. W.
Washington, D. C. 20036

BRUCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004

JAMES R. WILSON
1785 K Street, N. W.
Washington, D. C. 20006

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BOEN
708 Chamber of Commerce Bldg.
Indianapolis, Indiana

GEORGE D. MICHAELSON
P.O. Drawer 847
Kansas City 41, Missouri

Of Counsel:
RICE, CARPENTER AND CARRAWAY
1111 E Street, N. W.
Washington, D. C. 20004

Phillips Brothers, Washington, D. C.

TABLE OF CITATIONS

	Page
Hearings Before Surface Transp. Subcom., Senate Com. on Com., 88th Cong., 1st Sess., sec. 43, pt. 2, at 801	5
Hearings on HR 4700 and HR 4701 Before House Comm. on Int. and For. Com., 88th Cong., 1st Sess., pt. 1, at 32	5
Lone Star Package Car Company v. *United States*, (N.D. Texas) Civil Action No. 4-355	3
New Haven, Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954)	3
Substituted Freight Service, 232 I.C.C. 683 (1939)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 908

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

---

REPLY TO MOTIONS TO AFFIRM

Pursuant to the provisions of Rule 16(3) of this Court, appellants American Trucking Associations, Inc., et al., file this reply to the motions to affirm filed by The Atchison, Topeka and Santa Fe Railway Company, et al. (railroad appellees) and by Acme Fast Freight, Inc., et al. (freight forwarder appellees).

1. The Court below struck down *two* rules promulgated by the Interstate Commerce Commission (Com-

mission), referred to as the "open-tariff" rules. This preliminary statement is necessary because both groups of appellees, while seeking affirmance of the rejection of both rules, devote their arguments to attempts to justify only the District Court's striking down the Commission's Rule 3, while ignoring Rule 2. The freight forwarder appellees say that the "core" of the Commission's rules is contained in Rule 3(a).[1] However, it is obvious that it is Rule 2 which embodies the Commission's stated goal "that TOFC service be made available to all at equal charges" (322 I.C.C. at 328)[2] and that Rule 3 is but a special application of that principle to motor and water carriers. Contrary to the freight forwarder statement, the core of the rules is Rule 2. The District Court acknowledged that "in considerable part the Commission's Rule 2 is merely a paraphrase of" Section 2 of the Act. (J.S. p. 35) However, it struck down both rules, primarily on the basis of the arguments by appellees which were not in fact directed to the content of Rule 2. On the basis of arguments about intermodal competition, the District Court rejected a rule which does not mention carrier relations, but merely restates the fundamental principle that common carrier service be made available to all at equal charges. In their motions to affirm, appellees chose to ignore this fundamental error in the District Court's opinion which is a basic issue in this appeal.

---

[1] Although the railroad appellees refer to both Rule 2 and Rule 3 by number, their entire argument is concerned with Rule 3.

[2] A copy of the Commission's report is attached to appellants' jurisdictional statement as Appendix C. In that appendix and in references herein, the pagination of the official Commission report is used.

Appellees persist in their view, which the District Court adopted, that TOFC service is a rail service and that, therefore, motor carriers may not participate in it. Both motions to affirm quote out of context the statement in the Commission report that it had found in the *New Haven* case (*Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954)) that "trailer-on-flatcar transportation is in fact transportation by railroad."[3] Manifestly the Commission, in the quoted sentence, had reference only to a portion of the total TOFC transportation service because it clearly stated its view that—

> "*all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportaiton: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery." (322 I.C.C. at 329. Emphasis in original.)

Appellees' arguments that the "open-tariff" rules would permit motor carriers to invade a field of transportation not open to them under the structure of the Interstate Commerce Act are premised on this failure to recognize the bimodal nature of TOFC transportation. It colored their interpretation, and that of the District Court, of the Commission's holding in *Substituted Freight Service,* 232 I.C.C. 683 (1939), in which

---

[3] Railroad motion to affirm at p. 7; freight forwarder motion to affirm at p. 9. This is a curious citation from the freight forwarders since it comes from that portion of the Commission decision which affirms the lawfulness of Plan I TOFC transportation, which the forwarders are appealing in Civil Action No. 4-355, *Lone Star Package Car Company* v. *United States* (N.D. Texas).

the Commission first stated that a person could not act as both carrier and shipper as to the same service. The Commission discussed *Substituted Freight Service* and the cases following it (322 I.C.C. at 331-34) and concluded that that statement was not intended to proscribe the type of substituted service intended by Rule 3:

> "What this language was directed at, as we understand it, was the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. Such a situation might occur were a carrier to tender a shipment to another carrier for transportation to a point it cannot serve or over a route it cannot use, or without providing in its tariff for the substitution." (322 I.C.C. at 333)

When a motor carrier is holding out as a carrier to perform its authorized service and provides in its tariff that, at its election but subject to shipper veto, it may substitute TOFC service for all or a portion of its line-haul service, it is not acting as a shipper or forwarder.

The Commission's rules require motor carriers to hold out only service that they are authorized to perform. In so doing, the motor carriers are not, by definition, holding out or engaging in freight forwarding service. The freight forwarder motion to affirm attemps to show a Congressional policy against the "open-tariff" rules. (pp. 6-9) The one clear expression of policy in Part IV of the Act is the definition of the term "freight forwarder" in Section 402(a)(5), 49 U.S.C. § 1002(a)(5), which excludes from its cover-

age a person holding out as a carrier subject to Part I, II, or III of the Act. Congress did not intend to embrace in the term "freight forwarder" a motor carrier, holding out as such and holding out only service it is authorized to perform, merely because it substitutes TOFC service for part of its line-haul.

Both groups of appellees refer to the failure of Congress to enact certain legislative proposals in 1962 and 1963 as indicating Congressional policy with respect to "open-tariff" TOFC service. (Railroad Motion to Affirm 3-4; freight forwarder Motion to Affirm 7-8). The District Court also referred to this "legislative inaction" as recognition and acceptance of a settled interpretation of the Act. (J.S. 50-51) Neither of the motions to affirm or the District Court opinion cites anything from the legislative history to show the reason for the legislative inaction. Congress did not give its reason or reasons. However, the failure to enact the proposed legislation may well have been occasioned by Congressional recognition that this proceeding was pending, a fact which was brought to the legislature's attention during the hearings.[4]

2. The railroad appellees contend that certain "policy justification" for the "open-tariff" rules discussed in the Government's jurisdictional statement are not supported by any findings by the Commission nor by any evidence of record. (p. 19) This

---

[4] *Hearings Before Surface Transp. Subcom., Senate Com. on Com.*, 88th Cong., 1st Sess., sec. 43, pt. 2, at 801; *Hearings on HR. 4700 and HR 4701 Before House Comm. on Int. and For. Com.*, 88th Cong., 1st Sess., pt. 1, at 32.

"policy" argument ignores the factual context of the Commission's decision and the very purpose of its embarking upon the instant proceeding. As we noted in our jurisdictional statement (pp. 5-6), the recent sudden development of TOFC transportation had been without the benefit of Commission consideration of this combination rail-motor service on a factual record. For this reason, one of the stated purposes of this proceeding was a re-examination of the pronouncements of prior decisions in the light of modern developments. (322 I.C.C. at 322) The Commission stated that this proceeding afforded the opportunity to explore differences of opinion which had arisen as to the wisdom and correct application of past decisions and to consider some abuses in the performance of piggyback (TOFC) service which had been revealed. (322 I.C.C. at 323) Based upon the record developed, the Commission concluded that "it would be in the public interest to lay down, through formal rules, certain guidelines for TOFC service and practices." (322 I.C.C. at 323-24)

All four of the "policy considerations" assailed by the railroads relate to the matter of railroad domination of TOFC service, a fact that is evident in the report and which arose from past Commission decisions which permitted railroads to exploit this inherently bimodal service, while allowing them to exclude motor carriers from participation. The railroads contend that there is nothing in the report to support a conclusion that railroad domination of TOFC service is a fertile source of discrimination among motor carriers (p. 20), echoing their earlier statement that there is no evidence of record on railroad "refusals to cooperate." (p. 8) However, there are numerous examples of record of railroads refusing to hold out

Plan I arrangements with motor carriers,[5] holding such arrangements out only to their subsidiary motor carriers,[6] or holding them out only to certain specialized types of carriers[7] or under special conditions.[8]

This railroad domination of TOFC service and their ability to limit or exclude motor-carrier participation, which the District Court opinion would perpetuate, is anticompetitive. Appellees do not dispute the Commission's finding, supported by the record, that the railroads have used TOFC transportation to divert a substantial volume of traffic from other modes of transportation. (322 I.C.C. at 307, 322) As long as railroads retain the right to exploit this bimodal rail-motor service and the power to exclude motor carrier participation, they will continue to exclude motor carriers entirely, to exclude all but their own subsidiaries, or to permit motor-carrier participation only on a non-competitive basis.

The final railroad argument is a contention that, if the "open-tariff" rules were approved, motor carriers

---

[5] See the Representations filed by Southern Railway Company, p. 1; Kansas City Southern Railway Co., p. 2; Chicago, Milwaukee, St. Paul & Pacific R. Co., p. 2; and the Verified Statements of New York Central R. Co., (Baylis), p. 15; Baltimore & Ohio R. Co., (Rettburg) p. 3; Western Maryland Ry., (Shafer) p. 2; Southern Railway, (Kirkman) pp. 8, 9 and (Burke) p. 2.

[6] See Representations filed by Chicago, Burlington & Quincy R. Co., p. 1; Denver & Rio Grande W.R. Co., p. 3; Saint Louis-San Francisco Ry. Co., p. 2.

[7] See the Representations of Atchison, Topeka and Santa Fe Ry. Co., p. 1 (only to auto haulers); Union Pacific R. Co., p. 2 (only to auto haulers).

[8] See the Representations of Southern Pacific Co., pp. 3-4 (only offered where there is no rate competition with Plan II).

would be able to aggravate the railroad peak traffic problem. (pp. 23-24) This is a highly speculative argument and the motion to affirm does not offer any factual support for its surmises about motor carrier action under the rules. In addition, this railroad argument represents an attempt to persuade the courts to furnish a judicial solution to an inherent operating problem in transportation. All transportation is subject to fluctuating demand or imbalanced movements which lead to peaks and valleys in traffic flow. The railroads already have this situation with respect to TOFC transportation and the adoption of the "open-tariff" rules would not aggravate it. Freight forwarders and shippers' associations are now permitted to use "open-tariff" TOFC service and in so doing are not obligated to observe the railroad traffic flow patterns. In large measure, the railroads are speaking of a situation which they, as well as all other carriers, are faced with today in varying degrees. The adoption of the "open-tariff" rules will not bring about any great infusion of new traffic to unsettle old patterns; it will merely give the motor carriers the opportunity to participate in this inherently bimodal service, which under prior Commission decisions the railroads and freight forwarders have been permitted to exploit to the motor carriers' detriment. Nothing in the Interstate Commerce Act justifies a common carrier refusing to handle certain traffic or selecting the members of the public it will serve in an effort to achieve a balanced traffic pattern.

The District Court acknowledged that Rule 2 is in effect a restatement of Section 2 of the Act and nothing in its decision or in the motions to affirm offers any justification for striking down a rule admittedly em-

bodying such a basic concept of common-carrier law. Rule 3 is no more than a special application of the Rule 2 concept to motor and water carriers. In order to sustain the rejection of Rule 3, it is necessary to show either that the basic rule is unlawful or that the Commission erred in adapting the basic premise to the carriers' relationship. This has not been done. Neither the District Court nor the appellees justify the rejection of Rules 2 and 3 by showing that the fundamental concept embodied in those rules is wrong. Nor have they shown that the Commission, in Rule 3, incorrectly applied this basic concept to motor and water carrier use of open TOFC tariffs.

The motions to affirm ignore the basic purpose of the Commission's proceeding and the justification given for its rules. The Commission recognized that trailer-on-flatcar service is inherently a bimodal service which permits the blending of both rail and motor service. In the *New Haven* case, *supra,* without a factual record to guide it, the Commission permitted railroads not only to engage in this bimodal service, but to control its use by motor carriers. Appellees do not dispute the Commission's finding that through the exploitation of TOFC service railroads have been able to divert a substantial volume of traffic from other modes of transportation, including motor carriers. Appellees seek to continue this rail domination of TOFC service which, if permitted will continue to be used to capture motor carrier traffic. The Commission's rules would do no more than give motor carriers the freedom to participate in this combination rail-motor service, not at the sufferance of their railroad competitors, but according to their ability to use it to provide efficient and economical transportation service to the public.

For the reasons stated, appellants respectfully request the Court to deny the motions to affirm and to give plenary consideration with briefs and oral argument.

Respectfully submitted,

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4112 San Jacinto Street
Dallas, Texas

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN
RICHARD R. SIGMON
1111 E Street, N. W.
Washington, D. C. 20004

Attorneys for Appellants

PETER T. BEARDSLEY
HARRY J. JORDAN
WILLIAM R. RUBBERT
F. G. FREUND
R. EDWIN BRADY
1616 P Street, N. W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004

JAMES E. WILSON
1735 K Street, N. W.
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Bldg.
Indianapolis, Indiana

GEORGE D. MICHALSON
P.O. Drawer 647
Kansas City 41, Missouri

Of Counsel:
RICE, CARPENTER AND CARRAWAY
1111 E Street, N. W.
Washington, D. C. 20004

DATED: March 28, 1966

BRIEF FOR THE APPELLANTS

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	12
ARGUMENT	
INTRODUCTION	14
I. The Commission's Order Allowing Motor And Water Carriers To Utilize Open-Tariff Trailer-On-Flatcar Service Effectuates The National Transportation Policy	17
II. The Commission's Order Allowing Motor And Water Carriers To Utilize Open-Tariff Trailer-On-Flatcar Service Is Authorized By The Interstate Commerce Act	24
A. The Commission Has Statutory Authority To Promulgate The Rules	25
B. The Open-Tariff Rules Do Not Conflict With Specific Provisions Of The Act	29
III. Prior Commission And Court Decisions Do Not Preclude The Commission Promulgation Of The Commission's Open Tariff Rules	35
CONCLUSION	40
APPENDIX	
Statutes Involved National Transportation Policy	41
Special Rates and Rebates Prohibited	41
Preference; Interchange of Traffic; Terminal Facilities	42
Rates, Fares, and Charges of Common Carriers by Motor Vehicle	42

TABLE OF CITATIONS

CASES: Page

Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968, aff'd *per curiam* 309 U.S. 638 36
Container Service, 182 I.C.C. 653 21
Drayage and Unloading at Jefferson City, Mo., 206 I.C.C. 436 21
Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U.S. 144 27
Interstate Commerce Commission v. Baltimore & O. R. Co., 225 U.S. 326 28
Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U.S. 235 ..... 26, 28
Interstate Commerce Commission v. New York, N. H. & H. R. Co., 372 U.S. 744 18
Kansas City S. Ry. v. United States, 282 U.S. 760 ..... 28, 29
Louisville & N. R. Co. v. United States, 282 U.S. 740 28
Movement of Highway Trailers by Rail, 293 I.C.C. 93 ..... 3, 4, 22, 38
Ready Truck Lines, Inc. v. United States, 42 F. Supp. 970, aff'd 314 U.S. 580 36
Substituted Freight Service, 232 I.C.C. 683 ..... 20, 35
Thompson v. United States, 343 U.S. 549 31
Through Routes and Through Rates, 12 I.C.C. 163 31
United States v. Pennsylvania R. Co., 323 U.S. 612 ..... 17, 30, 37
Vehicle Container Rates in Southwest, 196 I.C.C. 127 21
Virginian R. Co. v. United States, 272 U.S. 658 37
Wight v. United States, 167 U.S. 512 27

STATUTES:

Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*

National Transportation Policy, preceding §§ 1, 301, 901, 1001 ..... 2, 17
Section 1(1)(a) 30
Section 1(4) 24
Section 2 ..... 2, 10, 24
Section 3(1) 2, 24, 26, 27
Section 4 24
Section 6 24
Section 6(7) 24
Section 216(c) 2, 7, 33

Page

Section 302(c)(1) 7
Section 304(a)(1) 34
Section 306(a) 36
Section 309(a) 36
Section 316(b) 25
Section 316(c) 2, 25, 31
Section 316(d) 27
Section 317(b) 25
Section 905(a) 25
Section 905(c) 25
Section 906(c) 25
Section 1002(a)(5) 34

Judicial Code, 28 U.S.C. §§ 1 *et seq.*

Section 1253 2
Section 2101(b) 2

Congressional Record, V. 79 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

JOINT BRIEF
OF
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS IN NO. 57,

AND

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN,
APPELLANT IN NO. 59.

OPINIONS BELOW

The opinion of the District Court (R. 17) is reported at 244 F. Supp. 955. The report of the Interstate Commerce Commission (R. 795) appears at 322 I.C.C. 301.[1]

JURISDICTION

The judgment of the District Court was entered on August 20, 1965 (R. 44-45). American Trucking Association, Inc., et al., appellants in No. 57, filed their joint notice of appeal on October 15, 1965 (R. 46-49). National Automobile Transporters Association of Detroit, Michigan, appellant in No. 59, filed its notice of appeal on October 20, 1965 (R. 52-53). This Court noted probable jurisdiction on April 18, 1966. 384 U.S. 902 (R. 54). The jurisdiction of this Court is conferred by 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, and sections 2, 3(1), and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§ 2, 3(1), 316(c), are set forth verbatim in the Appendix, *infra,* pp. 41-43.

QUESTIONS PRESENTED

Whether the Interstate Commerce Commission has the authority to promulgate rules providing (1) that trailer-on-flatcar or piggyback service offered under railroad open-tariff publications[2] must be made avail-

---

[1] A copy of the Commission's report is incorporated in the record at p. 795. Citations to the report herein are to the page number in the report.

[2] That is, held out by lawfully published and filed tariff to the general shipping public.

able on the same terms to all who wish to use them, including motor and water common and contract carriers, and (2) that motor and water common and contract carriers may, subject to certain conditions, utilize trailer-on-flatcar or piggyback service under open rail tariffs in the performance of their authorized service.

STATEMENT[3]

The proceeding before the Commission represented that agency's "first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service."[4] (322 I.C.C. 303) On June 29, 1962, the Commission, on its own motion, issued a notice of proposed rulemaking (R. 55) instituting an investigation into trailer-on-flatcar (TOFC) or piggyback service, and named as respondents all railroads, motor carriers, water carriers, express companies, and freight forwarders, of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act. The notice of proposed rulemaking made clear that the investigation was to be broad in scope, with the stated purpose of:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided

[3] This statement is limited to those portions of the Commission's proceeding that are in issue in this appeal.

[4] The only prior consideration given by the Commission to the entire field of trailer-on-flatcar transportation, *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (1954), was a decision rendered without a factual record and before the recent dramatic growth of this form of transportation, discussed *infra*.

> and utilized by or for rail, motor. and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require." (R. 55-56)

The notice listed certain specific issues to be considered and determined, including, among others:

> "The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] TOFC rail rates and service in their operations." (R. 56)

A prehearing conference was held October 9, 1962, at which proposed rules (reproduced in Appendix II of the Commission's report, 322 I.C.C. 406-10) were distributed. No oral hearing was held, but opportunity was given to all parties to file representations, verified statements, and reply statements. An Examiners' report issued (R. 605 *et seq.*), and numerous parties filed exceptions to the report and replies to those exceptions. (Appendix I of the Commission report, 322 I.C.C. 405) After oral argument the Commission rendered its decision March 16 (served April 3), 1964. (R. 795)

Piggyback or TOFC service is defined as the movement on a railroad car of a freight-laden highway motor vehicle or the incidental empty movement of the highway vehicle on a railroad car. (Rule 500.1, Appendix IV of the Commission report, 322 I.C.C. 413.) Piggyback service permits the door-to-door movement of freight in a highway motor vehicle using transportation over steel rails, without the necessity of transferring the freight from the highway vehicle to a rail car and

back again. The freight is loaded into the highway vehicle—usually a semi-trailer—at the shipper's place of business, and is drawn over the streets and highways by a motor-vehicle tractor to the nearest railroad piggyback yard. There the trailer is detached from the tractor and loaded onto the rail flatcar, usually by means of a ramp. The trailer-laden flatcar is moved by rail to a piggyback ramp near the destination, where the reverse procedure occurs and the freight-laden trailer is moved over the streets and highways to the consignee's place of business for unloading.

As found by the Commission, piggyback service has developed in terms of five numbered plans[5] into two

---

[5] The Commission's capsule definitions of these five plans (322 I.C.C. 304-05) are:

Plan I

Railroad movement of trailers or containers of motor common carriers, with the shipment moving on one bill of lading and billing being done by the trucker. Traffic moves under rates in regular motor carrier tariffs.

Plan II

Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III

Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

Plan IV

Shipper or forwarder furnishes a trailer or container-loaded flatcar, either owned or leased. The railroad makes a flat charge for loaded or empty-car movement, furnishing only power and rails.

Plan V

Traffic moves generally under joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement.

major classifications: (a) joint intermodal trailer-on-flatcar service in which traffic is moved jointly by a rail carrier and a motor or water common carrier pursuant to a negotiated agreement for the division of revenues, and (b) all-rail or open-tariff TOFC service which includes any piggyback service in which traffic moves exclusively at rail rates and on rail billing. (322 I.C.C. 319)

By use of open-tariff or all-rail TOFC service, both railroads and freight forwarders may provide the shipper with a door-to-door transportation service[6] without the necessity of unloading and reloading in transit. As a result, whereas the provision of a door-to-door service has historically been an identifying characteristic of motor carrier transportation, "all three—rail carrier, motor carrier, and freight forwarder—are even today providing, through the use of piggyback, services which in physical characteristics are substantially similar." (322 I.C.C. 330)

Since all trailer-on-flatcar service, as the name indicates, involves a movement in part over steel rails, the railroad is a necessary party to the service and dominates and controls it. Under the open-tariff plan II,

---

[6] Although plan II is the only open-tariff plan in which the railroad holds out by tariff to furnish more than a ramp-to-ramp service, the Commission noted that even though plans III and IV contemplate the use of trailers or flatcar-trailers combinations owned or provided by shippers rather than the railroads:

> "[A]s TOFC service has grown there has arisen the practice of trip leasing trailers and flatcars by individual shippers wishing to take advantage of the available, minimal-service, ramp-to-ramp rail rates, and of the fact that their responsibility for the trailer ceases at the end of a one-way trip, thus eliminating the cost of dead-heading an empty vehicle back home." (322 I.C.C. 313)

the railroad can perform the highway portion of transportation within its terminal areas[7] and provide a door-to-door transportation service without the participation of a carrier by another mode. Under open-tariff plans III and IV, the railroads may provide the ramp-to-ramp rail movement of trailers delivered to them and received from them by the shipper and consignee. Also under open-tariff plans III and IV, a freight forwarder may act as both shipper and consignee as to the rail movement and hold out a door-to-door transportation service to private shippers. Thus, both the railroads and the freight forwarders, through the utilization of trailer-on-flatcar transportation, may provide a complete door-to-door transportation service in competition with the independent motor carriers.

Motor carriers may participate in trailer-on-flatcar service under the intermodal plans I and V only at the sufferance of the railroads since, under the Act, through routes between motor carriers and railroads are permissive rather than mandatory.[8] Under past Commission decisions, motor carriers may not utilize the open-tariff trailer-on-flatcar plans.

Thus, prior to this decision, the railroads possessed the power to control the participation by independent motor carriers in trailer-on-flatcar service. The railroads have made effective use of this power to limit motor-carrier participation in the service. A number of the nation's largest railroads do not hold out inter-

---

[7] Under the provisions of section 202(c)(1) of the Interstate Commerce Act, 49 U.S.C. § 302(c)(1).

[8] Section 216(c) of the Interstate Commerce Act, 49 U.S.C. § 316(c).

modal plan I service to motor common carriers or, where they do, hold it out only on limited types of traffic,[9] or only to their own subsidiaries.[10] No plan I service is provided in large areas in the country.[11]

The growth of trailer-on-flatcar service has been sudden and rapid. The Commission's report characterizes this growth as "explosive" in the five years preceding its publication (322 I.C.C. 305) and notes that carriers and shippers alike agree that trailer-on-flatcar service "has already established itself as an extraordinarily significant and valuable innovation on the trans-

---

[9] See Verified Statement of R. H. Holter, Baltimore & Ohio R. Co. (R. 231); Representations of Kansas City Southern Ry. Co. and Louisiana & Arkansas Ry. Co. (R. 74); Statement of Chicago, Milwaukee, St. Paul and Pacific R. Co. (R. 94); Verified Statement of Arthur E. Baylis, New York Central R. Co. (R. 198); Verified Statement of Joseph A. Kirkman, Southern Ry. System (R. 268); Verified Statement of William C. Schafer, Western Maryland Ry. Co. (R. 267); Representations of Atchison, T. & S. F. Ry. Co. (R. 122) (On automobiles only); Representations of Burlington Lines (R. 105) (On motor vehicles only); Representations of Union Pacific R. Co. (R. 99) (On motor vehicles only). See statement of Southern Pacific Co. (R. 79-80. Plan I would not be offered to motor carrier offering rates lower than all-rail rates.)

[10] Representations of Denver and Rio Grande Western R. Co. (R. 125); Representations of Burlington Lines (R. 105) (Other than on motor vehicles, its plan I service is limited to a subsidiary motor carrier); Representatives of St. Louis-San Francisco Ry. Co. (R. 65-66).

[11] There is "no Plan I service of any type available between midwest points east of the tier of states of Wyoming, Colorado, and New Mexico, on the one hand, and, on the other hand, points in the states west thereof. Transcontinental railroads operating between the latter points have elected not to offer any form of Plan I service to motor carriers between such points." Pacific Intermountain Express Co., Supplemental Statement of W. S. Pilling (R. 123).

portation scene and that it has an almost unlimited future ahead of it." (322 I.C.C. 321) Even the dissenting Commissioner referred to the "remarkable growth" of trailer-on-flatcar service and characterized the service as "the brightest star in the transportation firmament." (322 I.C.C. 386) While recognizing certain limitations on the statistical information available to it, the Commission cited the following figures as evidence of the development of trailer-on-flatcar service in the five years preceding its report:

> "In 1957 a total of 57 class I railroads were participating in TOFC tariffs; in mid-1963 there were 100 class I roads doing so. In 1955, 32 railroads reported a total of 168,150 TOFC carloadings, for a weekly average of 3,234. In 1959, 50 reporting railroads showed totals of 415,156 annual and 7,984 weekly average carloadings for TOFC. For 1963, 63 reporting railroads indicated continued growth to approximately 797,500 loaded TOFC cars, a weekly rate of approximately 12,700 loadings." (322 I.C.C. 309)

Because of the sudden explosive growth of trailer-on-flatcar service, the Commission recognized the obvious gaps in its knowledge about the scope and impact of this service and the regulatory lag in dealing with it. Most of the decisions dealing with trailer-on-flatcar service were rendered before it achieved any significance on the transportation scene. A number of the prior decisions re-evaluated here by the Commission relate to motor carrier use of open-tariff trailer-on-flatcar service, and for this reason, a basic question throughout the Commission proceeding involves the concept of equal trailer-on-flatcar charges for all, including carriers by other modes. (322 I.C.C. 319)

The railroads and the freight forwarders objected to the proposal that motor carriers and water carriers be given the opportunity to utilize trailer-on-flatcar service and put forth a number of legal arguments which were fully dealt with by the Commission in its report. (322 I.C.C. 329-36) In dealing with these arguments, the Commission called attention to their failure to recognize the inherent bimodality of this transportation service:

> "What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: the railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speed; and the motor carrier's ability to provide door-to-door, and if necessary job- or farm-site, pickup and delivery." (322 I.C.C. 329; emphasis in original.)

As a result of this inherent bimodality, all three—rail carrier, motor carrier and freight forwarder—are in a position to provide complete door-to-door service which, in essential characteristics, is substantially similar. (322 I.C.C. 330)

As a result of its conclusions, the Commission issued two rules relating to the availability of open-tariff TOFC service to all on equal terms.[12] As the Court

---

[12] Rule 2 (designated in the report as 500.2) provides:

> "TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like

below found, Rule 2 is in considerable part merely a paraphrase of section 2 of the Act, 49 U.S.C. § 2 (R. 25), while Rule 3(a) relates to the specific application of the concept underlying Rule 2 to motor carrier, water carrier, and freight forwarder use of trailer-on-flatcar service.

Appellee railroads and freight forwarders brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, to challenge these rules. The District Court concluded that Rules 2 and 3 exceeded the Commission's authority and set them aside. It rested its decision on a number of grounds: that under the Interstate Commerce Act railroads may exclude motor carriers and water carriers from the public they are required to serve; that motor carriers are not authorized to use trailer-on-flatcar service without the railroads' consent; that the rules conflict with part IV of the Act which forbids any person to act as a freight forwarder without a permit issued by the Commission; and that the promulgation of the rules conflicts with a long line of prior Commission decisions which have become a settled interpretation of the Act.

---

kind of traffic under substantially similar circumstances and conditions."

The essential portion of Rule 3 (designated as 500.3 in the report) is subsection (a) which provides:

> "Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." (322 I.C.C. 413)

SUMMARY OF ARGUMENT

Trailer-on-flatcar service combines the ability of motor carriers to perform a door-to-door transportation service in the same highway vehicle and the railroad's ability to transport large volumes of freight over long distances at high speeds. Railroads have been utilizing this bimodal service to capture traffic which had previously been moving by other modes of transportation; however, under prior Commission decisions, motor carriers are barred from participating in trailer-on-flatcar service except at railroad sufferance.

In publishing its open-tariff rules, the Commission was carrying out its obligation under the National Transportation Policy to recognize and preserve the inherent advantages of each mode of transportation in administering the Interstate Commerce Act. It correctly concluded that the Congressional purpose could best be carried out and the highest degree of coordination achieved by permitting motor carrier use of this bimodal service without the intervention of railroad control. Viewing the Interstate Commerce Act as a whole, the Commission's decision here implements the basic obligation of common carriers by insuring that this recent, significant transportation development will be available to all persons who desire to use it on equal terms and without discrimination. Nothing in the Act provides an exception to this duty based on the fact that the person tendering the loaded trailer under a rail open tariff is a carrier by another mode.

On the other hand, nothing in the Interstate Commerce Act precludes a motor carrier from utilizing service under an open rail trailer-on-flatcar tariff for a portion of its authorized service. The Act does not bar a motor carrier from participating in this bimodal

rail-motor service, provided the shipper is given the option, as the Commission's rules require, to choose an all-highway movement. The Commission's authority to require continuous and adequate service is sufficient to protect against the motor carrier abandoning its highway service completely. The provision by a motor carrier of TOFC service through the utilization of an open-rail tariff does not constitute a holding out of joint through service by a motor carrier and the railroad whose tariff is utilized. The motor carrier holds out a complete door-to-door service to the shipper and the railroad's holding out is limited under its open tariff to the motor carrier.

The Commission's rules do not conflict with the provisions of part IV of the Act governing freight forwarders. Motor carriers have historically provided a consolidation and distribution service on less-than-truckload freight. Congress recognized that there were operational similarities between the service performed by motor carriers, among others, and freight forwarders, and specifically provided that in performing such services, the motor carriers were not acting as freight forwarders. Since the Commission's open-tariff rules permit motor carriers to hold out and furnish trailer-on-flatcar service only as an incident to their authorized service, the motor carriers do not thereby become freight forwarders.

The long line of Commission decisions which the District Court concluded constitutes a "settled interpretation" of the Act do not provide an analysis of the Commission's reasons for stating that a person may not act as both a carrier and a shipper as to the same service. The Commission's analysis of those cases here properly led it to find that they do not

preclude a motor carrier from utilizing service under open rail trailer-on-flatcar tariffs in the performance of its authorized service. The District Court's contrary holding would unduly restrict the Interstate Commerce Commission in carrying out its functions under the Act and the National Transportation Policy to respond to new developments in transportation as the need arises.

ARGUMENT

INTRODUCTION

Although the idea of transporting freight-laden highway vehicles on railroad cars is not new, trailer-on-flatcar or piggyback transportation was of relatively minor significance until the latter half of the 1950's. Since that time its growth has been explosive. (322 I.C.C. 305) As a result, most of the Commission's decisions dealing with the subject were rendered "during the infancy of this transportation prodigy . . . before anyone could have realized the important place TOFC service was destined to attain. . . ." (322 I.C.C. 322) The Commission concluded, therefore, that there was a need to re-examine its past decisions in the light of modern developments, and a need to fill in the gaps in its available knowledge about trailer-on-flatcar operations. (322 I.C.C. 322-23) Coupled with these needs were certain immediate and pressing problems which had arisen shortly before this proceeding was instituted, and which required solutions. These various factors led the Commission to the institution of this rulemaking proceeding.

Trailer-on-flatcar transportation does not fit into the conventional modal pattern which divides surface transportation into rail, motor, and water carrier service. Trailer-on-flatcar service, as its name suggests,

combines the inherent advantages of both rail and motor transportation. (322 I.C.C. 329) As a result of this inherent bimodality of trailer-on-flatcar service, the various modes of surface transport, as well as freight forwarders, by its use, can all provide transportation services which in physical characteristics are essentially similar. By this method, if not prohibited, the carriers can voluntarily achieve the intermodal coordination of transportation which Congress has declared to be one of the significant objectives of transportation regulation.

The recent phenomenal growth of trailer-on-flatcar service has not come about through any sudden infusion of new traffic into the national transportation system; rather it has resulted from railroad capture, through the use of trailer-on-flatcar service, of "a substantial volume of traffic that previously had been moving by other modes of transportation, private and for-hire." (322 I.C.C. 307) While the railroads have been able to make use of this bimodal rail-motor transportation operation to divert traffic from their motor carrier competitors, the motor carriers have been able to participate in trailer-on-flatcar transportation only to the extent that the railroads have been willing to permit. Under Commission decisions rendered before anyone was aware of the revolutionary potential of this transportation innovation, motor carriers are barred from participating in trailer-on-flatcar transportation through the utilization of service held out to the public under open rail TOFC tariffs.

In publishing regulations requiring railroads in their open-tariff publications to make trailer-on-flatcar service available on equal terms to all users, including motor and water carriers, the Commission was restat-

ing the basic obligation of common carriers to transport for all on equal terms without discrimination, and applying that obligation to this recent transportation development. In other words, an "open tariff" should not be a contradiction in terms, but should be available to the traffic of all shippers whether originated by one carrier mode or by another. The Commission's rules are designed to lay down certain guidelines for the future growth and development of trailer-on-flatcar service "and as a means of insuring that this recent and valuable transportation service is made available to all persons who are able to make effective use of it." (322 I.C.C. 324)

In holding that the Commission's rules must be struck down, the Court below would countenance the continuation of a significant departure from the common carrier obligation of the railroads. It reached this conclusion from a part-by-part search of the statute for specific provisions forbidding railroads to discriminate against motor carriers and authorizing motor carriers to utilize trailer-on-flatcar service. Not unsurprisingly, the Court could find no specific provisions dealing with this bimodal transportation phenomenon, the significant development of which occurred many years after the statutory provisions became effective. This interpretation, involving as it does rigid compartmentalization of the statute, "regardless of altered circumstances in the transportation industry" (R. 24), fails to give effect to the Commission's power and duty to administer and enforce the Interstate Commerce Act in accordance with the specific considerations set out in the National Transportation Policy.

This Court has recognized that Congress did not, in specific provisions of the Act, spell out in detail all of the obligations of carriers. Dealing with a similar intermodal problem in *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945), it said:

> "There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in [February 4] 1887, 24 Stat. 379, c 104, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system." (Citations omitted)

I. The Commission's Order Allowing Motor and Water Carriers To Utilize Open-Tariff Trailer-on-Flatcar Service Effectuates the National Transportation Policy

Congress has declared it to be the national transportation policy to provide for the fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each mode. (49 U.S.C. preceding §§ 1, 301, 901, and 1001) This Court has recently concluded that factors spelled out in the declaration of that policy are more than merely hoped-for ends and are operative

factors which are bases for regulatory action on an adequate record. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744, 761-62 (1963).

Almost from its inception on an experimental basis, trailer-on-flatcar service was designed to attract to the railroads traffic which theretofore had been moving over the highways by truck. In the 1930's, trailer-on-flatcar service was developed and designed "to induce trucking companies to ship their vehicles by rail instead of operating them over the highways." (322 I.C.C. 306) The early open-tariff service was "intended to attract traffic from all highway carriers, including for-hire motor carriers as well as private shippers operating their own trucks, and from freight forwarders." (*Ibid.*) In order to accomplish this, the railroads had to devise a service with the basic inherent advantages of truck transportation. Describing the first such service offered, the Commission said: "[I]t would provide a door-to-door delivery of less-than-carload freight in trailer units requiring no transfer of lading en route from shipper to consignee." (322 I.C.C. 305)

Although the use of TOFC transportation remained rather sporadic until 1954, its growth from that time has been "explosive." However, that growth has been in substantial part at the expense of the for-hire motor carriers. The Commission found that piggybacking has been a decisive factor in shifting to the railroads a substantial volume of traffic that previously had been moving by other modes of transportation and that while the growth of intermodal plan I has meant a direct growth in railroad participation in motor common carrier highway traffic, the growth of open tariff plans

III and IV has resulted in diversion of highway traffic from both the for-hire and private motor carriers. (322 I.C.C. 307-08) At the time of its report, however, the Commission did not have available sufficiently refined or reliable data to determine the precise extent to which railroad successes with piggybacking have meant actual diversion of traffic from competing modes of transportation. (322 I.C.C. 308) But the evidence does indicate that the major growth has been in the all-rail, so-called open-tariff plans in which carriers by other modes do not participate. At the prehearing conference, the Commission distributed a general summary of completed piggyback questionnaires. (R. 135-41) That summary shows that virtually all of the selected reporting railroads participate in plans II and III, and about three-fourths participate in plan IV—the three all-rail or open-tariff plans. Only "somewhat more than half" of the reporting railroads participate in the intermodal plans I and V, and traffic in plan V "generally is extremely limited." (R. 135-36)

The general findings regarding the direction of growth of trailer-on-flatcar transportation are borne out by the specific statistics of individual railroads. The Pennsylvania Railroad Company, probably the major railroad participant in plan I, transported an estimated 80,000 trailers in intermodal plan I service in 1962; however, in the same year it handled an estimated 120,000 trailers in plans II and III, the all-rail plans. (322 I.C.C. 307) In 1962, the Louisville and Nashville Railroad Company handled 6,712 trailers in plan II service and 8,618 trailers in plan III, while it handled 1,771 trailers in plan I service in 1961. (322 I.C.C. 307)[13] A representative of that company in a

[13] The Commission report gives the 1961 figure for plan I and 1962 figures for plans II and III.

verified statement in this proceeding averred that plan III is the fastest growing form of TOFC service on the Louisville and Nashville, and now represents a very substantial part of that railroad's total TOFC traffic. He went on to state that the potential traffic available for plan III service has not even remotely been developed and to express his company's belief that plan III service "will, within the foreseeable future, become a very important component of our overall traffic." (R. 258)

Trailer-on-flatcar service is a bimodal service combining the essential inherent advantages of both motor and rail transportation, but the railroads have used it during the recent years of its phenomenal growth as a competitive weapon to divert traffic from the for-hire motor carriers. While the railroads are free, without the help of motor carriers, to effect a bimodal TOFC transportation service over their lines, the motor carriers, on the other hand, cannot do so without the cooperation of the railroads. This inequality has been brought about because the railroads have been in a position to control, in large measure, motor carrier participation in trailer-on-flatcar service. In a line of decisions beginning with *Substituted Freight Service,* 232 I.C.C. 683 (1939), the Commission held that a motor carrier could not act both as a carrier and as a shipper as to the same service and, consequently, could not participate in trailer-on-flatcar service by utilizing rail open-tariff service. Thus, the motor carriers were limited to participation in trailer-on-flatcar service under one of the intermodal plans (I or V) which, under section 216(c) of the Act, require that a voluntary through-route, joint-rate arrangement be established with the participating railroad. As noted, *supra,*

many of the nation's largest railroads do not hold out intermodal plan I service to motor carriers [14] or hold it out only on a limited, non-competitive basis,[15] and in a major area of the country no intermodal plan I service is held out by any railroad.[16]

One result of the Commission's re-evaluation in this proceeding of past decisions was the opportunity to gain a clearer understanding of the nature of trailer-on-flatcar service and of its place in the transportation system. In these prior decisions, admittedly rendered during the infancy of piggybacking, trailer-on-flatcar service was viewed either expressly or implicitly as transportation by railroad. See the review in *Movement of Highway Trailers By Rail,* 293 I.C.C. 93, 98, 101 (1954). This view was no doubt encouraged by the fact that the question first arose before motor carriers were brought under federal regulation. For example, the Commission was of the view, prior to 1935, that it was improper for a railroad to publish rates which included line-haul transportation by highway which was then not subject to its regulation, *Drayage and Unloading at Jefferson City, Mo.,* 206 I.C.C. 436 (1935), although it approved the publication of rates applicable to the transportation of freight in highway trailers on railroad flatcars, which was intended to be used in conjunction with motor vehicle transportation over the streets and highways. *Container Service,* 182 I.C.C. 653 (1932); *Vehicle Container Rates in Southwest,* 196 I.C.C. 127 (1933).

---

[14] *Supra,* n. 9.

[15] *Supra,* n. 10.

[16] *Supra,* n. 11.

In these early reports, the Commission's view of trailer-on-flatcar service as transportation by railroad resulted from the consideration of only that portion of the service which was subject to its jurisdiction—transportation by railroad under what is now part I of the Act. However, this tendency to consider only the rail portion of a transportation operation designed to embrace elements of both rail and motor transportation carried over into the decisions rendered subsequent to 1935, when part II of the Act, regulating motor carriers, was enacted. In *Movement of Highway Trailers by Rail, supra,* 293 I.C.C. at 100-01, the Commission, in this connection, referred to "a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive over steel rails laid on the railroad's right-of-way. . . ."

Considering in the instant case the entire field of trailer-on-flatcar transportation for the first time on an adequate record, the Commission recognized that it does not begin and end at the railroad ramp; the freight-laden trailer must be moved over the streets and highways from the shipper and to the consignee. The highway trailer is no less essential to the success of trailer-on-flatcar service than is the flatcar. From its beginning, the purpose behind the development of TOFC service was to provide a door-to-door delivery of freight without transfer of lading en route and the only way this could be done was to utilize a highway trailer as the basic transportation unit.[17]

As the Commission recognized in its report, the railroad control over motor carrier participation in this

[17] Or "the container portion of any highway truck, trailer, or semi-trailer having a demountable chassis. . . ." Rule 500.1, *Definition of TOFC Service.* (322 I.C.C. 413)

bimodal transportation service contravenes the requirement of the national transportation policy for fair and impartial regulation of all modes of transportation subject to the Act. By freeing the motor carriers of railroad control over their participation in trailer-on-flatcar service, the Commission intended to give the freest play to the inherent advantages of each mode through the encouragement of the highest degree of coordination and specifically concluded that such coordination is in the public interest. (322 I.C.C. 330) Such coordination is one of the designated ends of the National Transportation Policy.

Motor carrier participation in trailer-on-flatcar service unrestricted by railroad veto also accords with the National Transportation Policy requirement for the promotion of economic and efficient service and the fostering of sound economic conditions in transportation and among the several modes. By limiting motor carrier participation to non-competitive situations and by refusing it in other circumstances, the railroads are in a position to preclude the economic use of this service. By denying motor carriers the opportunity to provide this bimodal TOFC service, the railroads not only may cripple their competitors, but also may prevent them from furnishing the public the economical and efficient coordinated transportation contemplated by the Congressional policy.

In striking down the Commission's open-tariff rules, the Court below did not specifically consider the requirements of the National Transportation Policy, but concerned itself primarily with a section-by-section analysis of the Interstate Commerce Act for specific authority for or prohibition against the Commission's action. In the next section of the argument, we will

discuss the District Court's analysis of the specific provisions of the Interstate Commerce Act, and in the final section, we will discuss the Court's conclusion that a line of prior Commission decisions establishes a settled interpretation of the Interstate Commerce Act which is no longer open to re-evaluation by the Commission.

II. The Commission's Order Allowing Motor and Water Carriers To Utilize Open-Tariff Trailer-on-Flatcar Service Is Authorized by the Interstate Commerce Act

The basic premise of federal transportation regulation is the common carrier obligation to provide service to all who desire to use it on equal terms and without discrimination. This common carrier obligation is so fundamental that it is not set out in any one provision of the Interstate Commerce Act, but permeates the legislation. Among other provisions based on this common carrier obligation are section 1(4), 49 U.S.C. § 1(4), which makes it the duty of every common carrier subject to part I "to provide and furnish transportation upon reasonable request therefor . . ."; section 2, 49 U.S.C. § 2, which prohibits unjust discrimination through special rates, rebates, or other devices; section 3(1), 49 U.S.C. § 3(1), which prohibits undue or unreasonable preferences or prejudices; section 4, 49 U.S.C. § 4, the "long and short haul" provision, which prohibits a special form of rate discrimination; and section 6, 49 U.S.C. § 6, which requires the publication of schedules of rates, fares, and charges, and subsection (7) thereof which prohibits carriers from engaging or participating in transportation except under and in conformity with those published tariffs. And, of course, these provisions applicable to railroad common carriers have their counterparts in other sections of the law applicable to motor and water carriers, *e.g.*,

49 U.S.C. §§ 316(b), 316(c), 317(b), 905(a), 905(c), 906(c).

The implementation of this common carrier obligation was the Commission's basic premise: "that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." (322 I.C.C. 319) Rules 2 and 3, the open-tariff rules, are designed to achieve that implementation in the field of trailer-on-flatcar transportation.

A. The Commission Has Statutory Authority to Promulgate the Rules

In reviewing the Commission's authority to issue the open-tariff rules making trailer-on-flatcar service available to the motor carriers, the District Court first looked to the Act both for specific statutory support in the form of a provision forbidding railroad discrimination against motor carriers in the services afforded, and the absence of any limitation against motor carrier use of open-tariff trailer-on-flatcar service. (R. 24) This emphasis on the *service* aspects of the rules arises from the Court's conclusion that "the ostensible object and effect of those [open-tariff] Rules is not to eliminate discrimination in rates under Section 2, but rather to compel the railroads to afford TOFC service to motor carriers if it is provided for others." (R. 26) However, the open-tariff rules are directed against both service and rate discrimination. Rule 2 not only provides that TOFC service, if offered in an open tariff, shall be made available to any person, but that it shall be provided at equal charges for the same service. Rule 3 provides for the specific application of the principle of Rule 2 to motor and water carrier

use of trailer-on-flatcar service under open-tariff rates published by rail carriers.

The District Court specifically considered sections 2 and 3(1) of the Act, 49 U.S.C. §§ 2, 3(1), as possible authority for the open-tariff rules and concluded that neither section offers such support, even though it acknowledged that in considerable part, Rule 2 is merely a paraphrase of section 2. (R. 25) The Commission, however, did not rest its promulgation of the open-tariff rules on specific affirmative provisions of any one section of the Act.

The District Court noted that sections 2 and 3 of the Act are complementary and are to be read *in pari materia,* but it did not go further and conclude that they must also be read in the context of other provisions of the Act relating to the common carrier obligation, nor did it recognize that the Commission's open-tariff rules are not limited to service discrimination but relate to rate discrimination as well. This Court has recognized the close interrelation between the duty to carry and non-discrimination in charges. In *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235, 252-53 (1911), it said:

> "The contention that a carrier, when goods are tendered to him for transportation, can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods, is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers, as to demonstrate the unsoundness of

> the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation."

Earlier, in *Wight* v. *United States,* 167 U.S. 512, 517 (1897), the Court described section 2 of the Act as "designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another." See *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 166 (1897).

The common carrier duty to serve all without discrimination is so fundamental to the entire transportation regulatory scheme that the burden rests with the carrier claiming the right to discriminate in derogation of that duty, to point to the specific statutory exemption which justifies such discrimination. The only justification considered by the District Court is the proviso of section 3(1) that the paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier. This proviso, enacted in 1940, was based on a similar proviso in section 216(d) of the Act, 49 U.S.C. § 316(d), enacted in 1935. In discussing the purpose of the proviso language in the earlier legislation, Senator Wheeler said:

> "Paragraph (d) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The

Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.

"*This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. This contention is not well founded* in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5656 (Emphasis supplied).

This Court has uniformly held that common carriers may not find exception to their common carrier obligation under the Act in the nature or identity of the shipper, *Kansas City S. Ry.* v. *United States,* 282 U.S. 760 (1931); *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931); *Interstate Commerce Commission* v. *Baltimore & O. R. Co.,* 225 U.S. 326, 342 (1912), or in his relationship to the shipment, *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235 (1911).

Rate discrimination and service discrimination are but two aspects of the same evil. To a person barred from using a common carrier service available to others, it makes little difference whether his exclusion

results from the assessment of an exorbitant charge or from a flat refusal to serve. The result in either case is the same. The suggestion that a common carrier may not discriminate in charges between persons it does serve, but that it may refuse service to certain shippers completely negates the entire concept of the common carrier obligation. And to permit that service discrimination, as the District Court would do, on the basis of the identity or nature of the shipper, runs directly contrary to this Court's holdings in *Kansas City S. Ry., etc., supra.*

B. The Open-Tariff Rules Do Not Conflict With Specific Provisions of the Act

In considering the arguments of appellees that the Commission's open-tariff rules conflict with specific provisions of the Act, the District Court concluded that the formal separation of the legislation into four modal parts, as well as the "internal logic" of the legislation, necessitate an equally sharp separation of the operations by each mode. (R. 30-31) The historic accident whereby the different modes were brought under federal regulation at different times would, under the Court's reasoning, prove a continuing barrier to their coordination. The Court's view of the statutory compartmentalization of transportation does not give recognition to the Commission's primary conclusion that trailer-on-flatcar service is a bimodal service, incorporating the basic characteristics of both rail and motor service.

Trailer-on-flatcar service, being essentially bimodal, is neither an exclusively rail service nor an exclusively motor service, and it cannot be made to fit the rigid modal pattern that the District Court would require. If, as the District Court found, carriers in each mode

are limited to transportation within and by that mode, absent special exception (R. 31), there is simply no place in the regulatory scheme for trailer-on-flatcar transportation. The District Court concluded that under the open-tariff rules, a motor carrier would be violating its certificate which authorizes it to engage in for-hire transportation by motor vehicle, not by rail or other modes. (R. 31) But railroads are authorized to engage in for-hire transportation by "railroad" [18] not by motor vehicle or other modes. When a railroad engages in trailer-on-flatcar service, utilizing a highway trailer, which moves partly on a flatcar over steel rails and partly over the streets and highways, providing a door-to-door movement of goods without transfer of the lading, it is not confining itself to transportation by railroad.

The District Court's view of the inviolable separation between the modes of transportation appears to preclude any technological development such as trailer-on-flatcar transportaiton which cuts across modal lines. Such a view would deprive the Commission of the power to regulate any such new transportation development except under specific statutory authorization and it would deprive the public of such service. Such a view is directly contrary to the view of this Court in *United States* v. *Pennsylvania R. Co., supra,* at 323 U.S. 616, that Congress cast the transportation legislation in broad terms, leaving the details to be spelled out in particular cases by the Commission and the courts in the light of the Congressional purpose to foster an efficient and fair national transportation system.

---

[18] 49 U.S.C. § 1(1)(a)

The District Court's position that transportation must under the statute be compartmentalized, "absent special exception" (R. 31), led it to consider the through-route provisions of section 216(c), 49 U.S.C. § 316(c), as the only relevant exception. (R. 31) Viewing trailer-on-flatcar service as essentially a rail service, the Court accepted the argument of appellees that "requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes" (R. 32), contrary to section 216(c).

As the Commission stated in response to those same arguments when made before it, what is a through route is a matter of fact. (322 I.C.C. 334) A through route can only come about by an arrangement between connecting carriers to form a continuous line of carriage. *Through Routes and Through Rates*, 12 I.C.C. 163, 166 (1907). In *Thompson* v. *United States*, 343 U.S. 549, 557 (1952), this Court said: "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service." When a motor carrier utilizes trailer-on-flatcar service under a rail open tariff, there is no holding out by connecting carriers of through service. The motor carrier is simply holding out a complete origin-to-destination transportation service to its shipper, and the railroad does not join in that holding out. The railroad's holding out is limited to the rail movement described in its open tariff and should be available to the motor carrier and to anyone else who desires to use it.

The differences between motor carrier use of open-tariff TOFC transportation and a rail-motor through route arrangement are numerous and sharp. Under its

open tariff, the railroad holds out service at rates which it sets and on terms and conditions it specifies; under a through-route arrangement, the railroad and motor carrier hold out a joint service at rates and subject to terms and conditions jointly established by the railroad and motor carrier. Under the open tariff, the railroad's bill of lading contract is with the motor carrier and covers only that portion of the movement embraced in the open tariff; under a through-route arrangement, the railroad and motor carrier jointly hold out a complete origin-to-destination transportation service to the shipper. Under the open tariff, the railroad is liable to the motor carrier only for the portion of the movement covered by the open tariff; under a through-route arrangement, the railroad is jointly liable with the motor carrier for the proper performance of the through service.

All that would be involved in motor carrier use of the open-tariff rules would be the unilateral substitution by the motor carrier of trailer-on-flatcar transportation for all or a portion of the highway movement. The absence of a joint holding out of service is made clear in paragraph (b) of Rule 3.[19] Although the shipper has the right under the rule to veto the use of trailer-on-flatcar service, he has no right to demand it as he would if there were a joint holding out of that service.

---

[19] Rule 3(b) provides:

"Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized." (322 I.C.C. 413)

The District Court assumed the existence of a *de facto* through route and devoted its discussion to the question of "compulsion." (R. 32-33) However, there is no through route involved; therefore, as the Commission found, there is no question of compulsion under section 216(c). (322 I.C.C. 335) The only question involved is whether a common carrier may be compelled to provide service held out in its published tariffs to all of the public on equal terms or whether it may select only that segment of the public it chooses to serve. An open tariff is one in which service is held out to the public with no qualification except that the user must meet the lawful tariff requirements. And nothing in the law authorizes a common carrier to pick and choose the persons it will serve. By striking down the open-tariff rules, the District Court would permit that form of discrimination to continue.

The District Court also concluded that the Commission's open-tariff rules conflict with the provisions of part IV of the Act governing freight forwarders. (R. 35) This conclusion is based on the Court's assumption that, under the rules, the motor carrier would "be permitted to confine its own service to the assembly and consolidation of the shipment, leaving the actual transportation to the railroad. . . ." (R. 35) However, the Commission made clear in its report that in utilizing trailer-on-flatcar service under open tariffs, the motor carrier must be operating as a carrier and must give proper notice to the public through its tariffs. It specifically stated that if the motor carrier should hold out to perform what may amount to only an assembly and distribution service and utilize the substituted service between points it may not serve in a practicable manner, it would no doubt be held not to be operating as a carrier. (322 I.C.C. 335)

The Commission called attention in its report to its power under section 204(a)(1) of the Act, 49 U.S.C. § 304(a)(1), to establish reasonable requirements with respect to continuous and adequate service, a requirement which is specifically incorporated in every motor common carrier certificate issued. It concluded that it has the necessary power to protect the interests of those who may be affected by a particular motor carrier's "overenthusiastic embracing of TOFC service," and that no further specific rule was necessary. (322 I.C.C. 365)

Here, also, the Court's conclusion rests on its assumption that the various modes of carriage are rigidly separated, an assumption we have dealt with above. Not only is there nothing in part IV which carves out an exclusive manner of operation for freight forwarders, but the existence of such an operating monopoly is specifically rejected by section 402(a)(5), 49 U.S.C. § 1002(a)(5). It defines the term "freight forwarder" to mean a person which "*otherwise than as a carrier subject to part I, II, or III*" of the Act holds out transportation service to be provided in a certain manner. The exclusory language expressly recognizes that there may be operational similarity between what is done by rail, motor, and water carriers and what is done by freight forwarders, but that such operational similarity does not make the rail, motor, or water carrier a freight forwarder. Contrary to the District Court's conclusion, a motor carrier does not become a freight forwarder merely because it utilizes trailer-on-flatcar service under open rail tariffs.

III. Prior Commission and Court Decisions Do Not Preclude the Promulgation of the Commission's Open Tariff Rules

The District Court also concluded that the Commission's open-tariff rules must fall because a line of decisions by the Commission and the courts now stand as a "settled interpretation of the Act" and preclude such rules. (R. 37-40) It should be observed that in 1939, long before trailer-on-flatcar transportation reached any substantial significance, and in a case in which the instant question was not directly before it, the Commission stated that a person may not act as both a carrier and a shipper as to the same service, *Substituted Freight Service,* 232 I.C.C. 683, 688-90. The statement was made in that case "without explanation or supporting precedent" (322 I.C.C. 332), and it was subsequently repeated in a number of decisions without any specific analysis of its meaning. In view of the total lack of reasoning to support this catch-phrase, it is difficult to understand the District Court's conclusion that it represents a "settled interpretation of the Act." (R. 40)

The Commission, in its report here, analyzed the *Substituted Freight Service* decision and those which followed it. (322 I.C.C. 330-34) It noted that the first time this statement was made (232 I.C.C. at 688) it was made in answer to an argument of certain railroads which were substituting *contract* motor carriage for their common carrier rail service that "neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public." In context, in *Substituted Freight Service,* the statement about acting as a carrier and shipper as to the same service is followed immediately by the further statement that either the railroad or the

motor carrier performing substituted service for it must have the necessary motor common carrier operating rights to perform the service. In the situation where the motor carrier was substituting rail service, the Commission said that the conflict could be corrected by bringing the service into conformity with the tariff provisions of the Act. The Commission concluded here that the statement in the earlier case condemning a person acting as a carrier and a shipper as to the same service was directed at the use of open-tariff service by a carrier not acting in its proper role of carrier, but acting instead as a shipper or forwarder. (322 I.C.C. 333)

The Court below acknowledged that few of the "consistent and repeated decisions" it relied on can be regarded as directly holding that motor carriers cannot lawfully avail themselves of the railroads' open-tariff trailer-on-flatcar service without railroad concurrence. (R. 37) In view of this and the total lack of support for the statement that a person cannot act as a carrier and shipper as to the same service in any of the decisions which repeat it, the "long line of cases" clearly does not represent a "settled interpretation of the Act," barring the Commission from a re-evaluation of the basis for those past decisions.

The Court buttressed its "settled interpretation" argument by referring to a similar principle established in *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C.N.Y. 1940), aff'd *per curiam* 309 U.S. 638; and *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), aff'd 314 U.S. 580. However, these cases which arose under the "grandfather" provisions of the Motor Carrier Act, 1935 (49 U.S.C. §§ 306(a) and 309(a)), relate to the necessity of an applicant for "grandfather" motor carrier

authority to show bona fide operations on and after the "grandfather" date. They hold that a person who is not himself engaged in operations as a carrier by motor vehicle may not, under the "granfather" provision, receive operating authority based on evidence of the motor vehicle operations of another person. Clearly, these cases do not support the conclusion that a carrier, operating as a carrier, may never substitute the transportation service of another.

The effect of the holding of the Court below is to force an undue rigidity upon the administrative process. It would compel administrative agencies either to withhold action for fear that future developments would call for a modification of such action or to force them into initial decisions which cannot subsequently be altered despite the impact of those future developments. It is directly contrary to the Court's conclusion in *Virginian R. Co.* v. *United States,* 272 U.S. 658, 665-66 (1926), that the courts are not concerned with alleged inconsistencies in findings in agency proceedings. The justification for Congressional establishment of administrative agencies is to permit the application of the law to meet new circumstances. With respect to the Interstate Commerce Commission, this Court has recognized that Congress has cast the regulatory provisions in general terms and has left it to the agency and the courts to spell out the contents of those terms in accordance with the National Transportation Policy. *United States* v. *Pennsylvania R. Co., supra,* at 323 U.S. 615.

This proceeding represents the first full-scale investigation by the Commission of "what is probably the most significant recent development in transportation." (322 I.C.C. 303) In the course of its investigation, the Commission re-evaluated prior decisions rendered before anyone could have appreciated the potential im-

pact of trailer-on-flatcar transportation. The Commission's decision represents a commendable effort to carry out the Congressional mandate to administer and enforce the Interstate Commerce Act "to the end of developing, coordinating, and preserving a national transportation system. . . ." The particular and obvious end objective here is intermodal coordination. Unless the Commission is free to respond to new developments when the need for their regulation arises, it will necessarily fail to carry out the Congressional purpose and will frustrate its justification for being.

Trailer-on-flatcar service has produced a substantial upheaval in the national transportation system. It has obliterated the historic lines of physical demarcation between modes of transportation and has enabled railroads, motor carriers, and freight forwarders to provide what amounts to essentially similar transportation service—a coordinated service which combines the inherent advantages of both rail and motor service. When questions regarding the recent use of this new bimodal service came before the Commission in *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), without a record of past operations and without any reasonable basis for forecasting the future impact of this rail-motor service, the Commission approved the railroad use of it.[20] Through its exploitation,

---

[20] In *Movement of Highway Trailers By Rail,* the motor carriers argued that the ability to provide a door-to-door transportation service in a single vehicle without rehandling of the cargo is the primary inherent advantage of motor carriers which Congress intended to preserve to them. They contended that trailer-on-flatcar service which embodies such a door-to-door movement in a highway trailer requires operating authority under the motor-carrier provisions of the Act. (293 I.C.C. at 97, 100) The Commission rejected this argument, as noted above, because it considered only the movement over the steel rails instead of the total door-to-door movement which TOFC service is designed to provide. (293 I.C.C. at 100-01)

the railroads have been able to divert a substantial quantity of traffic from competing modes of transportaiton including the for-hire motor carriers. (322 I.C.C. 307, 322). They have accomplished this by avoiding the limitations inherent in railroad operations, and are thus in a position to offer shippers a complete door-to-door movement of freight in the same highway vehicle without interchange of lading en route—the primary inherent advantage of motor carriers. Through the use of trailer-on-flatcar service, the railroads are no longer confined to service at points adjacent to the railroad tracks, but can extend their service over the streets and highways to the doors of shippers and consignees everywhere.

As a result of prior Commission decisions, railroads were not only able to utilize the inherent advantage of motor carriers to take traffic from them, but were also in a position to bar motor carrier use of this service except at rail sufferance, thereby depriving the public of an efficient and economical service. In the instant proceeding, the Commission, recognizing the bimodal nature of trailer-on-flatcar service, has moved in the direction of restoring the competitive balance by concluding that motor carriers may participate in trailer-on-flatcar service through the use of rail open-tariff rates. The decision assures that motor carrier use of this bimodal rail-motor service will not be subject to rail veto.

The decision of the Court below resulted from a rigid formalistic interpretation of the legislation which it felt constrained to follow "regardless of altered circumstances in the transportation industry." (R. 24) It failed to give weight to the Commission's power and duty to administer and enforce the provisions of the Interstate Commerce Act in the light of the specific

declaration of policy which precedes it. In its decision, the Commission acted in full accord with the mandate of that policy to provide for the fair and impartial regulation of all modes of transportation subject to the Act.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed and the Commission's Rules in issue sustained.

Respectfully submitted,

PETER T. BEARDSLEY
HARRY J. JORDAN
R. EDWIN BRADY
ALBERT B. ROSENBAUM
1616 P Street, N.W.
Washington, D. C. 20036

BRYCE REA, JR.
1329 E Street, N.W.
Washington, D. C. 20004

JAMES E. WILSON
1735 K Street, N.W.
Washington, D. C. 20005

GUY H. POSTELL
1375 Peachtree Street, N.E.
Atlanta 9, Georgia

FERDINAND BORN
708 Chamber of Commerce Building
Indianapolis, Indiana

GEORGE D. MICHALSON
P. O. Drawer 647
Kansas City 41, Missouri

HERMAN MATTHEI
125 Lincoln Street
Boston 11, Massachusetts

Of Counsel:

RICE, CARPENTER AND CARRAWAY
1111 E Street, N.W.
Washington, D.C. 20004

ROBERT GAWLEY
631 Niagara Street
Buffalo, New York

LEGRAND A. CARLSTON
4045 Pecos Street
Denver 11, Colorado

F. H. LYNCH, JR.
4112 San Jacinto Street
Dallas, Texas

GEORGE S. DIXON
One Woodward Avenue
Suite 1700
Detroit, Michigan 48226

ROLAND RICE
HOMER S. CARPENTER
JOHN S. FESSENDEN

RICHARD R. SIGMON
1111 E Street, N.W.
Washington, D. C. 20004

Attorneys for Appellants

APPENDIX

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SPECIAL RATES AND REBATES PROHIBITED

Sec. 2 [*As amended February 28, 1920, June 19, 1934, and August 9, 1935*]. [*49 U.S.C. § 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, col-

lects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

PREFERENCE; INTERCHANGE OF TRAFFIC; TERMINAL FACILITIES

Sec. 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, August 12, 1935, September 18, 1940, August 2, 1949.*] [*49 U.S.C. § 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

Sec. 216 [*August 9, 1935, as amended June 29, 1938, and September 18, 1940.*] [*49 U.S.C. § 316.*]

* * * *

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common

carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.